IN THE

Supreme Court Of The United States

October Term, 1942

No.....

WERT T. REED AND F. F. DOLLERT,
Petitioners

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL,
Respondents

BRIEF

IN SUPPORT OF APPELLANTS' APPLICATION FOR PETITION OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is contained on pages 1041 and 1042 of the Transcript of Record, and is reported in Volume 142 F. (2d) 748.

II.

JURISDICTION

The date of the judgment of the Circuit Court of Appeals is the 8th day of January, 1943. (Tr. R. 1041). Petition for rehearing was made and was denied on February 17, 1943. (Tr. R. 1082).

This Court has jurisdiction of 28 U. S. C. Section 347 (Jud. Code, Section 240, amended, and also by virtue of Rule 38, 5(b) of the Revised Rules of this Honorable Court.

III.

STATEMENT OF THE CASE

The statement of the case is to be found under heading "I" in the petition. In the interest of brevity it is not repeated in the supporting brief.

Under heading "IV," "Reasons Relied on for the Allowance of the Writ," authorities are quoted under each question and points raised are discussed. This, therefore, will be, in fact, more or less of a supplemental brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in sus-

taining the judgment of the District Court in its findings that there "was no fraud."

2. The Circuit Court of Appeals erred in sustaining the judgment of the District Court in that, assuming for argument sake, that there "was no fraud," which petitioners emphatically deny, such finding does not determine the issues made in its case by the pleadings, record, evidence and exhibits —thus leaving the case wholly undecided.

3. The Circuit Court of Appeals erred in failing to pass on the question whether Thomas H. Pratt, who represented the Pratt-Hewit Corp., under the undisputed evidence, had placed himself in a position where self-interest conflicted with duty.

4. The Circuit Court of Appeals erred in failing to pass on the question whether the September 28, 1925 contract unlawfully delegated to the directors and officials of the Houston Oil Co. the power, authority, and discretion vested in the directors and officials of the Pratt-Hewit Corp. under its charter, the statutes of Texas and Delaware, and the Texas Supreme Court decisions applicable to said question.

5. The Circuit Court of Appeals erred in failing to pass upon the question whether the September 28, 1925 contract violated the Texas Usury statutes as interpreted by the Supreme Court of Texas.

6. The Circuit Court of Appeals erred in failing to pass on the question whether the September 28,

1925 contract violated the Texas Monopoly and Anti-Trust statutes as interpreted by the Supreme Court of Texas.

7. The Circuit Court of Appeals erred in making it appear by the decision which it filed that there was only one determinative issue in the case, namely, that a fraud had or had not been committed, an issue of fact which the District Court had answered in the negative, and which was, therefore, conclusive upon the Circuit Court of Appeals when, as a matter of fact, there was no dispute as to the evidence and the issues in the case were questions of law which were not mentioned or discussed in the opinion of the Circuit Court of Appeals.

V.

Summary of Argument as Found in IV., Reasons Relied on for the Allowance of the Writ and in Supporting Brief.

The Circuit Court of Appeals, by its affirming the decision of the District Court, which was "there is no fraud," says that there is only one decisive issue in the case and that is an issue of fact whether or not the evidence disclosed fraud, which the District Court answered in the negative and which the Circuit Court of Appeals says is fully sustained by the evidence.

The evidence primarily consists of Exhibits 9, 10, 10A, 11, 12, 13 and 37, all contracts or assignments

or leases made and executed by the Houston Oil Co., Pratt and Rooke and further consists of the account books of the Houston Oil Co., all of which cannot be and are not disputed.

Petitioners contend:

(a) that the acts of Pratt and the Houston Oil Co., as set out in the records listed in the foregoing paragraph, cannot be disassociated from fraud, that fraud is not determinative of the question as to whether the September 28, 1925 contract should be cancelled, and that therefore the decisive issues presented by the records of this case *have not yet been passed upon by either the District Court or the Circuit Court of Appeals.*

(b) that the undisputed evidence and records conclusively show

First, that the undisputed evidence and records show that Pratt placed himself in a position where self interest conflicted with duty.

Second, that on the face of the September 28, 1925 contract it appears that that instrument unlawfully delegates the right and power and duty vested with the directors of the Pratt-Hewit Corp. by virtue of its charter and the statutes of Texas and Delaware, with the directors of the Houston Oil Co.

Third, the September 28, 1925 contract, on its face, shows that it attempts to legalize that which the

Usury Statutes of Texas forbid as interpreted by the Supreme Court of Texas.

Fourth, that the September 28, 1925 contract, on its face, shows that it attempts to legalize that which the Monopoly and Anti-trust laws of Texas forbid, as interpreted by the Supreme Court of Texas.

VI.

ADDITIONAL ARGUMENT

A Contract Growing Out of or Connected with a Prior Illegal Contract—the Illegality of the Latter Enters into the New Contract and Renders it Illegal.

The September 28, 1925 contract grew out of all the personal loans extended to Pratt by the Houston Oil Co. and out of the exhibits 9 to 13, inclusive, and the other overt acts occurring when the September 28, 1925 contract was entered into, therefore, the illegality of the contracts made between Pratt and the Houston Oil Co. entered into the making of the September 28, 1925 contract and made the latter also illegal and void. Fraud can breed nothing but fraud.

> "Where a contract grows immediately out of and is connected with a prior illegal contract, the illegality of such prior contract will enter into the new and render it illegal, and the rule has been broadly stated that if the connection between the original illegal contract can be traced and if the latter is connected with and grows out

> of the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of recovery. 13 C. J. p. 509, sec. 460; Armstrong v. Toler, 11 Wheat, 258, 6 L. Ed. 468; Tomkins v. Seattle Cons. & Dry Dock Co. 96 Wash. 511, 165 p. 384." Horbach v. Coyle, 2 F. (2d) 707 (C. C. A. 8).

The foregoing "*Horbach* v. *Coyle*, supra," is quoted in the case of *Oldham* v. *Briley*, 118 S. W. (2d) 797, 809. (Tex. Civ. Appeals)

Quoting from the case of "*Shelton* v. *Marshall*," 16 Tex. 344, 363, the Court, in the *Oldham* v. *Briley* case, said:

> "It is well settled that when an original contract is illegal, any subsequent contract ,which carries it into effect, is also illegal."
>
> "Where a contract grows immediately out of, and is connected with a prior illegal contract, the illegality of such prior contract will enter into the new contract and render it illegal: . . . . . So every new agreement in furtherance of, *or for the purpose of* carrying into effect, any of the unexecuted provisions of a previous illegal agreement is likewise illegal and void, and is a contract the performance of which *depends on performance of a prior invalid contract.*" 17 C. J. S. 672.

(The above is virtually the same as is found in 13 C. J. S. 509, sec. 460 which is quoted in *Amarillo Oil Co.* v. *Ranch Creek Oil & Gas Co.* (Tex. Civ. App.) 271 S. W. 145, 154).

"The rule is that, where the contract grows out of and is connected with an illegal or immoral act, a court of equity, will not enforce it, and if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a mere contract, it is equally tainted by it. Seelligson v. Lewis, 65 Tex. 215, 57 Amer. Rep. 593; Wegner Bros. v. Biernig & Co. 65 Tex. 506; Prudential Life Ins. Co. v. Pearson, 188 S. W. 513." Dodd v. Rawleigh Co., 203 S. W. 131. (Tex. Civ. App.)

One Void Consideration Makes Entire Contract Void.

"The illegal and legal considerations (if there be any legal ones) are inextricably mingled, and the papers (or other facts) do not furnish means whereby the unlawful considerations may be exclusively apportioned to the improper obligations so as to leave a valid obligation, complete in itself, supported by an independent valid consideration (if any there be). This portion of paragraph 4, its results, is within the general rule:

'That a promise made upon several considerations, one of which is unlawful, no matter *whether the* illegality be *at common law or by statute, is void.*' Edwards County Jennings, 89 Tex. 618, 35 S. W. 1053, 1054, and authorities cited; Wegner Bros. v. Biernig, 65 Tex. 506, Id. 76 Tex. 506, 13 S. W. 537; Reed v. Brewer, 90 Tex. 144, 37 S. W. 418." Raleigh Co. v. Land, 279 S. W. 810, 813 (Tex. Com. App.).

"If any part of the consideration in a contract

is illegal, if not severable, the whole consideration is void. It matters not whether it is illegal because it consists in some act prohibited by statute or condemned by the common law." Prudential Life Ins. Co. v. Pearson, 188 S. W. 513, 515, (Tex. Civ. App.)

The September 28, 1925 Contract, in that it Provides for that which Various Texas Statutes Prohibit, Cannot be Ratified by Either the Directors or Stockholders, and Courts are Powerless to Breathe Life and Validity into It.

"It is the established principle that confirmation may make good a voidable or defeasible estate, *but cannot operate upon or aid an estate which is void in law.* 1 Devlin on Real Estate (3d Ed.) Sec. 18, p. 30; 14 Tex. Jur. Sec. 23, p. 776; Breitling v. Chester, 88 Tex. 586, 32 S. W. 527, 529; Montgomery v. Hornberger, 16 Tex. Civ. App. 28, 40 S. W. 628, 629, 1 Warvelle on Vendor's, sec. 388, p. 402." Clark v. Humble Oil & Refg. Co. 57 S. W. (2d) 597, 602, reversed on other grounds, 87 S. W. (2d) 471.

"If this contract is illegal and against public policy, there is no power which can breathe life or validity into it, and the ratification attempted to be made by the City Commission would be void. 19 R. C. L. sec. 196; 13 C. J. 506." Meyers v. Walker, 276 S. W. 305, 307. (Tex. Civ. App.)

"The distinction between malum in se and malum prohibitum has long since been exploded, and as 'there can be no civil right where there can be no remedy, and there can be no legal rem-

edy for that which is itself illegal.' Bank of U. S. v. Owens, 2 Pet. 527, 539, it is clear that contracts in direct violation of statutes expressly forbidding their execution, cannot be enforced.

"The question is not one involving want of authority to contract on account of irregularity of organization or lack of affirmative grant of power in the charter of a corporation, but a question of absolute want of power to do that which is inhibited by statute, and, if attempted, is in positive terms declared 'utterly null and void.'

" 'The rule of law,' said Parker, C. J. in Russell v. De Grand, 15 Mass. 35, 39, 'is of universal operation, that one shall not by and of a court of justice, obtain the fruits of an unlawful bargain'." Gibbs v. Consolidated Gas Co., 130 U. S. 396, 419, 32 L. Ed. 979, 9 S. Ct. 553.

See also Hood v. Campbell (Tex. Civ. App.) 2 S. W. (2d) 925, reversed on other grounds, 35 S. W. (2d) 98; Slaughter Cattle Co. v. Potter County, 235 S. W. 295, 316; California State Life Ins. Co. v. Kring (Tex. Civ. App.) 208 S. W. 372.

"When the performance of a contract otherwise legal will involve the violation of the terms of a statute or of positive rule of law, *it is not enforcible and cannot be ratified* nor its terms made binding by ratification, waiver, or otherwise. Rue v. Missouri Pac. Ry. Co., 8 S. W. 533, 74 Tex. 474, 15 Am. St. Rep. 852; Raywood Rice C. & M. Co. v. Erp, 146 S. W. 155, 105 Tex. 161; Chimene v. Pennington, 79 S. W. 63, 34 Tex. Civ. App. 424." Ferguson v. Mounts, 281 S. W. 616, 621.

The Undivided 3/32 Interest in the Rooke 200 Acre Lease which Pratt Received is a Continuing Bribe and Fraud.

The 200 acre lease of A. D. Rooke became productive, according to Rooke's testimony, on September 7, 1925. (Tr. R. 836). It continued to be productive during the remainder of Pratt's life and is still highly productive and the check which used to go to Pratt now goes to his heirs each month. (Tr. R. 780). This continuous production coming from this 3/32 undivided interest originally contemplated and did occasion the daily cooperation between the Houston Oil Co. and Pratt, and between the former and Pratt's heirs since his death. The Houston Oil Co. drilled a large number of additional wells, operated the same, credited Pratt's account each day with the income from the 3/32 interest, and its payment of a monthly check for the royalty and the acceptance of this by Pratt and after his death by his heirs presents a series of acts committed by the parties day by day "contemplated bringing to pass continuous results that will not continue without the continuous cooperation of the conspirators to keep it up." Either party could at any time have refused to go on with the unlawful agreement. At the same time that this was going on and until his death Pratt was the dominant stockholder and the official in complete charge of the corporation's affairs in Texas. He, therefore, owed a duty to the Pratt-Hewit Corporation, a fiduciary one, one that he contumaciously violated each day and was aided and abetted in this by the Houston Oil

Co. by its sending him its monthly check coming from the alleged royalty, totalling $125,000 or more. This presented a situation in which Pratt's private business interest with the Houston Oil Co. squarely conflicted with the unqualified duties he owed to his corporation when representing it in making the September 28, 1925 contract with the Houston Oil Co. Pratt continued in these impossible contradictory dual interests and this impossible relationship from 1925 until his death on September 3, 1938. All the dealings that took place between Houston Oil Co. and Pratt from the executing of the September 28, 1925 contract (this being the first) and which are still being carried on with the Pratt heirs, M. A. Shaw, president and director, and George P. Pratt as director of the Pratt Hewit Corporation, are illegal and void—at their inception. *Wile et al* v. *Burns*, 265 N. Y. 461, (supra) and other cases cited herein.

The two drilling contracts, Exhibits 10 and 10A, were amended, modified and enlarged by a written contract dated June 8, 1933, between the Houston Oil Co., Pratt and Rooke. (Tr. R. 973-977)

Justice Holmes, in the case of *United States* v. *Kissel*, 218 U. S. 607, 608, 31 S. Ct. 124, 126, said:

> "The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the continuando may be disregarded and a plea is proper to show that the statute of limitation has run. Subsequent acts in pursu-

ance of the agreement may renew the conspiracy, or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplated future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime.

"The agreement, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfied the definition of the crime, *but it does not exhaust it.* It is true, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Irving, 98 U. S. 450. *But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and when there is such continuous cooperation, it is a perversion* of natural thought and of language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one."

"A continuing offense is a continuous unlawful act or series of acts set on foot by a single impulse and operated by an intermittent force, however long a time it may occur. United States v. Midstates Horticultural Co. Pa. 59 S. Ct. 412, 414, 306 U. S. 161, 83 L. Ed. 563." 9 Words & Phrases, Per. Ed. Cum. Pkt. 37.

"The fourth cross-assignment, relating to the late entry of the Sinclair Refining Co. into the state, is without merit and is overruled. This

company is sued as a corporation with the other defendants in error, and, having once entered the conspiracy, *however late*, becomes in law a party to every act previously or subsequently done by any of the others in pursuance of it. 12 C. J. 612, sec. 181." State v. Standard Oil Co. (Tex. Sup. Ct.), 107 S. W. 550, 560.

In the case of *Waters-Pierce Oil Co.* v. *Texas*, 53 L. Ed. 417, 429, 212 U. S. 86, 29 S. Ct. 220, 225: Appellant had been found guilty of violating the Texas Anti-Trust Laws and thereby forfeited its right to do business in Texas. It was charged that Waters-Pierce Oil Co. had entered into a conspiracy with the Standard Oil Company of New Jersey, et al, to violate the Texas Anti-Trust Law.

"It is contended in the case that the acts in this case were given retroactive effect, in violation of the Federal Constitution, Art. I, Sec. 10. This argument is predicated largely upon the contention that the conviction in the case was because of the old agreement of the former Waters-Pierce Oil Co. made long before the passage of the present statute *at a time when it was legal*, and before the creation of the defendant company. But in view of the facts found in the state court, to which we have already referred, there was ground for conviction, not because of the making of the old agreement for the division of the territory and the suppression of competition while the old company was in existence, *but because the new company was found to have carried out the old agreement and made itself a party thereto, and, by continuing the arrangement after the pas-*

sage of the law, had brought itself within its terms."

See also, *United States* v. *Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. Rep. 540.

From the foregoing authorities, it must be held that the Pratt heirs, one of them being the wife of M. A. Shaw, by accepting the income from the 3/32 Pratt interest in the A. D. Rooke lease, joined the conspiracy with the same effect as though they were original parties to it.

A few months after the death of Pratt, which was September 3, 1938, M. A. Shaw, the husband of Laura J. Shaw, a daughter of Pratt, was elected president by the directors of the two Pratt-Hewit corporations, and, as has already been shown by Fairbrother's testimony, the income from the 3/32 interest in the Rooke 200 acre lease is being paid by the Houston Oil Co. to Pratt's two daughters, Laura J. Shaw and Frances R. Webster, and his son, George P. Pratt and to his wife, Grace D. Pratt. The only party or company with which the two Pratt-Hewit corporations had any dealings was and still is the Houston Oil Co. M. A. Shaw and also George P. Pratt as directors, therefore, disqualified to act in behalf of the Pratt-Hewit Corporation and its stockholders in its dealings with the Houston Oil Co. Shaw from year to year is elected as president of both the Pratt-Hewit corporations. The directors of the Pratt-Hewit Corporation and

their relatives own about 2/3 of the stock of the two Pratt-Hewit corporations.

The District Court in its Finding of Fact No. 18, said:

> "No. 18. The fraud, if any was committed, was consummated in 1925. By reason of the fact that the stock had already been set up on the books in the name of Pratt and Hewit and the fact that the contract, sought to be cancelled, and the leases executed pursuant thereto assigning to the defendant Houston Oil Company of Texas, a one-half interest were executed in November, 1925, the plaintiff's and intervenor's contention that the fraud is a continuing fraud because of the amendment of the drilling contract of 1932 and 1933 is without merit. The fraud had already been consummated, and the fact that royalties were subsequently paid thereunder would not, in my judgment, operate to continue the fraud so as to entitle this plaintiff Wert T. Reed to bring action." (Tr. R. 517).

The Circuit Court affirmed this finding of the District Court when it said:

> "The findings and conclusions of the District Court are free from error and the judgment appealed from is affirmed."

Appellants contended through the trial of the case and in their briefs filed with the United States Circuit Court of Appeals, that the 3/32 interest which Pratt received constituted a continuing

fraud, and also that Shaw was disqualified from representing the Pratt-Hewit Corporation in its dealings with the Houston Oil Co.

This attempt of a fiduciary to serve conflicting dual interests has been going on for 18 years and is still insisted upon by the directors continuing to elect M. A. Shaw as president of the two corporations. It has met with the full approval of the District Court and is affirmed by the United States Circuit Court of Appeals for the Fifth Circuit. This flaunting of a law so universally approved by the courts in all jurisdictions, one which lies at the basis of the relationship between a fiduciary and his cestui, will continue as long as oil and gas is produced from the oil and gas leases alleged to be held jointly by the Houston Oil Co. and the Pratt-Hewit Corporation unless this Court takes jurisdiction.

The Finding of the District Court and its Affirmation by the Circuit Court that there Was No Fraud is Wholly Unsupported.

Enough has already been said to show very clearly the error of the above finding. However, there are a few other striking features of Pratt's private dealings with the Houston Oil Co.

Suppose that on June 6, 1925 Pratt had not been the manager or an official or a director of the Pratt-Hewit Corp. and had asked the president of the Houston Oil Co. to have the company loan him $5,000, wouldn't he have been promptly told that the Houston Oil Co. is not in the business of loan-

ing money, and further that its charter would not permit it to make loans to anyone? Even if Pratt had been a special friend of the president or some other official of the company the answer would not have been otherwise.

The Houston Oil Co. offered no evidence showing that any other individuals were accommodated by it with loans, nor did it attempt to explain just why Pratt was the only privileged character. There is no escape from the conclusion that Pratt was given these loans because he was the resident manager, the dominant official and stockholder of the Pratt-Hewit Corp. which owned 23,000 acres of oil and gas leases with two big producing gas wells which the Houston Oil Co. wanted and that it was only through Pratt that it could expect to be given a contract by the Pratt-Hewitt Corp. such as the September 28, 1925 contract is.

An examination as to just what each one of the triumvirate got out of the A. D. Rooke lease will disclose some interesting things.

Pratt didn't put out a single dollar but received an undivided ½ interest in the Rooke 200 acre lease, and was subrogated to Rooke's rights in the two drilling contracts, exhibits 10 and 10A, which Rooke had made with the Houston Oil Co. Furthermore, Pratt sold a 7/32 interest in the lease to the Houston Oil Co. for $32,500 and to Buckner, president of the Houston Oil Co. a 4/32 for $18,571.40 and re-

tained in himself a 3/32 out of which he realized at least $125,000 before his death.

There is nothing in the record, whatsoever, to show just why A. D. Rooke should make Pratt a present of this ½ interest.

A. D. Rooke really represented the Rooke family, as he testified (Tr. R. 840-841). It was the Rooke family that owned this land on which the lease was taken. The lease was given A. D. Rooke by his father and mother.

A. D. Rooke didn't pay out a single dollar and didn't take any gamble.

The Houston Oil Co., although it owned no interest in the lease whatsoever, by the two drilling contracts agreed to furnish all the necessary money with which to drill the exploratory wells, equip them with casing and other equipment, and if the wells were producers, then it had the privilege of operating the wells until it repaid itself for drilling and equipping them, and as soon as that was done, it was to move off its drilling equipment; if the hole was dry then the Houston Oil Co. alone was to lose all the money spent in drilling the dry hole. The contract specifically provided that Rooke and his assignee were not to be liable for any money spent by the Houston Oil Co. in drilling the dry holes.

There was another very unusual feature in the arrangement as to this 200 acre lease between the

Houston Oil Co and Rooke and Pratt. Ordinarily, all the land owner gets out of drilling a well on his land is a 1/8 royalty, but in this unusual arrangement between these three parties the Rooke family were permitted to retain a ½ interest in the leasehold, so that their interest in the oil and gas lease was ⅛ plus 7/16, or a total of 9/16. This means that out of every 16 bbls. of oil produced on the lease 9 bbls. went to the Rooke family. Pratt himself paid nothing for his ½ interest. Rooke was paid for that ½ interest he sold and conveyed to Pratt, but was not paid by Pratt but by the Houston Oil Co. who permitted the Rooke family to retain a ½ leasehold interest. It is plain that the Houston Oil Co. paid Rooke for what Rooke gave to Pratt.

The first well on the 200 acre lease was completed in September, 1925. At that time the Houston Oil Co. had no interest in the lease and did not get any interest until January 1, 1926 when the Houston Oil Co. bought 11/32 interest for which it paid $51,571.40 (including Buckner's interest).

Attention is again called to the fact that under the contract the Houston Oil Co. was obliged to stand the loss of the cost of every dry hole that was drilled. Just what was there in this deal between the Houston Oil Co., Rooke and Pratt, financially, as to the 200 acre Rooke lease? In the two drilling contracts the Houston Oil Co. did reserve the right, at its election, to buy the oil and gas produced, at market price. But that is far from a satisfactory explanation as to why the Houston Oil Co. entered into this

singular oil venture—a game which they thoroughly understood and could not be easily victimized in. No explanation has been offered by the Houston Oil Co.

Oil companies do not pay bonuses and take the gamble of paying for the cost of drilling any and all the dry holes on the lease for the privilege of buying oil and gas at current market prices. Nor do oil companies contract to drill test wells on a landowner's tract of land and agree to pay all cost of drilling and lose such cost of the well if it proves to be a dry hole and if productive to be merely repaid to the extent of the amount expended in drilling and equipping the new well without first having executed to themselves an oil and gas lease from the landowner before they undertake anything of that kind.

The Houston Oil Co. acquired no interest whatsoever in the Rooke 200 acre lease until it purchased a 7/32 interest from Pratt, and Buckner purchased his 4/32 interest on January 1, 1926. Those interests represent the extent of the Houston Oil Co.'s ownership of the oil and gas underneath the Rooke 200 acre lease at this date. There is nothing in the record or even an attempt to explain such unheard of oil and gas lease contracts as were made between the Houston Oil Co., Pratt and Rooke.

Only one conclusion can be drawn from it all, namely, that the motivating cause of the fraudulent transaction, the impelling "impulse" of the conspiracy, was that the Houston Oil Co. was determined, regardless of all costs, or character of method em-

ployed, to get the September 28, 1925 contract, for it was through that contract that the Houston Oil Co. figured and did realize its profits that arise out of the fraudulent conspiracy. That was what Buckner meant when he testified:

> "On page 36 (deposition) Mr. Buckner states that at the time the contract was made those were unusual times, competition was very keen down there, and an operating company would do a whole lot to get the gas; that, what it wanted was the gas in its line and not so much at 6 cents a foot." (Tr. R. 833)

> "On page 37 (deposition) Mr. Buckner states that he wanted the gas and 'we wanted to smash our competitors,' and he said that his competitor was O. R. Seagraves and his crowd, and the landowner knew it and didn't fail to hold him up." (Tr. R. 833)

> "On page 58 (deposition) Mr. Buckner testifies that the competitive battle down there was just as serious as the battle on the German front today." (Tr. R. 834)

Pratt contributed no money or property of his own to the illegal conspiracy. What he brought into it was not his to give, or to sell, that is, his official discretion which he did use to deliver to the Houston Oil Co. the September 28, 1925 contract. Being not his, he had no right to take from the Houston Oil Co. as his own the $51,071.40, nor the income from the 3/32 interest in the 200 acre lease amounting to $125,000 or more. Nor did the Houston Oil Co. have the right

to pay him said money, nor did it have the right to loan him the various sums of money which it did.

The Houston Oil Co. knew that Pratt represented the Pratt-Hewit Corp.; knew of his complete control over that company and its directors; knew that Pratt was keeping all these transactions a secret from his corporation. It aided and abetted him in this secrecy by its failure to place of record these various Exhibits 10 to 12, inclusive. It became voluntarily a particeps criminis in the conspiracy to perpetrate the fraud upon the Pratt-Hewitt Corp. and its stockholders.

VII.

CONCLUSION

The facts in the case, consisting entirely of the written records made by Pratt, the Houston Oil Co. and Rooke, have not and cannot be disputed. These facts are of such character and are made under such circumstances that according to the decision of *Pepper* v. *Lytton* (Supra) that the burden of proof is upon the officer, for the latter in his

> "dealings with a corporation are subjected to *rigorous scrutiny* and where any of their contracts or engagements with the corporation is challenged, *the burden is on the director* or stockholder, not only to prove the good faith of the transaction. but also to show its inherent fairness from the viewpoint of the corporation and those interested therein."

The Houston Oil Co. and the other defendants who hold interests through the Houston Oil Co. and Pratt have utterly failed to meet the requirements of a dominant stockholder as set out in the foregoing decision.

The failure of the Circuit Court of Appeals to apply to the facts in the case the following test and to pass upon the jurisdictional questions which appear upon the record—

First, whether Thomas H. Pratt placed himself in a position where self-interest conflicted with duty,

Second, whether the September contract, on its face, unlawfully delegated to the directors of the Houston Oil Co. the right to manage the affairs of the Pratt-Hewit Corp., vested in the directors of said corporation, by virtue of the charter of the Pratt-Hewit Corp., and the laws of Texas and of Delaware,

Third, whether the September contract, on its face, violated the Texas Usury Statutes and

Fourth, whether the September 28, 1925 contract violated the Monopoly and Anti-Trust Statutes, place the decision of the Circuit Court of Appeals in direct conflict with the local laws of Texas and the decision of its Supreme Court and is also in direct conflict with the decisions of this Court and of the Circuit Court of Appeals of other circuits.

WHEREFORE, petitioners respectfully submit that the writ of certiorari prayed for should be granted.

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